Office - Supreme Court, U. S.
OCT 12 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 450

ANNA SCHOMMER, JOHN J. HOROWITZ AND MILTON M. ADELMAN, OWNERS OF CERTAIN FIRST MORTGAGE FIVE PER CENT GOLD BONDS OF CHICAGO RAILWAYS COMPANY AND CHICAGO CITY RAILWAY COMPANY,

Petitioners,

vs.

JAMES H. WILKERSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

JAMES M. SHEEAN,
Attorney for Respondent.

Of Counsel:

J. F. DAMMANN,
Counsel for Trustee of First Mortgages of Chicago City Railway Company and Calumet and South Chicago Railway Company;

HENRY F. TENNEY,
Counsel for the Trustee of First Mortgage and the Bondholders' Committee of Chicago Railways Company;

WILLIAM J. FRIEDMAN,
Counsel for First Mortgage Bondholders' Committees of Chicago City Railway Company and Calumet and South Chicago Railway Company;

JOHN W. KEARNS,
Counsel for Committee Representing Holders of Chicago City and Connecting Railways Collateral Trust Bonds;

WILLIAM J. FROELICH,
Counsel for Walter A. Shaw.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Statement of the Case and Questions Presented..... 1

Summary of the Argument 5

The Argument 6

CASES CITED.

Case v. Los Angeles Lumber Co., 308 U. S. 106..... 13

Edinburg Coal Co. v. Humphreys, 134 Fed. 839 (C. C. A. 7th) 6

Ex Parte Peterson, 253 U. S. 300 9

First National Bank v. Flershem, 290 U. S. 504..... 13

Goldsmith v. Board of Tax Appeals, 270 U. S. 117.... 6

Gregory v. Pike, 67 Fed. 837 (C. C. A. 1st)..... 10

Guaranty Trust Company of New York v. Minneapolis St. L. R. Co., 52 Fed. (2d) 418 (C. C. A. 8th).....8, 10

Howard v. Shinn, 190 Fed. 940 (C. C. A. 9th)..... 10

Palmer v. Bankers Trust Co., 12 Fed. (2d) 747 (C. C. A. 8th) 8, 10

Richter v. Jerome, 123 U. S. 233, at 246.....8, 10

Rheinberger v. Security Life Ins. Co., 72 Fed. (2d) 147 (C. C. A. 7th) 9

Shaw v. Railroad Co., 100 U. S. 605, at 611.....8, 10

Toler v. E. Tennessee Ry. Co., 67 Fed. 168 (C. C., Tenn.) 10

U. S. v. California Cooperative Canneries, 279 U. S. 553 9

U. S. v. Cox, 47 Fed. (2d) 988, 990 (C. C. A. 5th)..... 6

Utilities Power & Light Corporation, In re, 90 Fed. (2d) 798 (C. C. A. 7th)..... 9

Williams v. Morgan, 111 U. S. 684..... 11

STATUTES CITED.

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938 (28 U. S. C. A. 347a) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 450

ANNA SCHOMMER, JOHN J. HOROWITZ AND MILTON M. ADELMAN, OWNERS OF CERTAIN FIRST MORTGAGE FIVE PER CENT GOLD BONDS OF CHICAGO RAILWAYS COMPANY AND CHICAGO CITY RAILWAY COMPANY,

Petitioners,

vs.

JAMES H. WILKERSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

1. The opinion of the Circuit Court of Appeals is reported in 112 Fed. (2d) 311 (C. C. A. 7th), and also is to be found in the Printed Record, pp. 80-86.

2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938. (28 U. S. C. A. 347a.)

3. Statement of the case and question presented.

Petitioners seek a review of the order of the Circuit Court of Appeals denying their application for a writ of mandamus. The question thus presented is a narrow one and does not require any extended examination of the rec-

ord or consideration of the many complicated questions involved in the Chicago Traction litigation.

The oral motion referred to below in paragraph numbered 1 was made in the three consolidated causes now pending in which receivers were appointed for the four companies comprising the Chicago Surface Lines (the street car system of the city of Chicago), and foreclosure proceedings are pending involving three first mortgages and a collateral trust issue aggregating $113,000,000. Contrary to the contention of petitioner, no plan of reorganization has been declared operative or finally approved. The plan known as the Abbott plan has been tentatively approved. Since the date of such approval, amendments with respect to issuance of securities to provide for unification with the company owning the elevated system have been filed. These amendments will have to be submitted to all security holders and an opportunity afforded to file objections and have a hearing thereon.

So that this court may see the real scope of the present issue, the following is submitted:

1. On January 10, 1940, petitioners made an oral motion in the District Court of the United States for the Northern District of Illinois, Eastern Division, for leave to file a petition, the prayer of which asked the Court to vacate certain orders theretofore entered appointing Walter A. Shaw as Court Adviser and making certain allowances to him as compensation for services rendered, and that he be required to return all moneys theretofore paid him. (Chicago Railways Printed Record in the District Court, p. 6596. This record consists of a number of printed volumes attached to the respondent's answer in the Circuit Court of Appeals as an exhibit, and it was filed with the Clerk of this Court by the petitioners, accompanied by a stipulation waiving printing of it as a part of the record.)

The petition did not ask for leave to intervene in the

proceeding and set up no grounds which would justify the court in permitting intervention.

This is the only petition which the parties ever sought to file and is the only motion ever made by them in the District Court.

2. Hon. Michael L. Igoe, one of the Judges of the United States District Court, after a hearing on this petition on January 10, 1940, entered an order denying leave to file the petition or leave to intervene because (a) no sufficient showing was made to justify intervention, and (b) no benefit would accrue to the estate by allowing intervention, and (c) the bonds held by the petitioners were already represented in the proceeding by a committee and competent counsel. (Chicago Railways District Court Record, 6606.)

3. On February 26, 1940, petitioners filed in the Circuit Court of Appeals for the Seventh Circuit an original petition for mandamus (Supreme Court Record 1). This petition asked for a writ of mandamus compelling the District Judge, to take the following action:

(a) Permit the filing of the petition theretofore presented to the District Court.

(b) Order the execution of the decrees of foreclosure and sale entered May 11, 1936, either by approving or disapproving the reports of sale and, if disapproved, to order new sales.

(c) Allow petitioners to intervene.

The respondent, filed his answer to this petition (Supreme Court Record, 27), and the Circuit Court of Appeals entered an order permitting the parties in interest to appear and file suggestions. These suggestions appear on pages 60-80 of the Supreme Court Record.

It will thus be seen that the relief which petitioners sought in the Circuit Court of Appeals was radically different from that which they sought in the District Court, as was pointed out in the opinion of the Circuit Court of

Appeals (Supreme Court Record, 83). The sole matter involved in the District Court proceeding related to the propriety of Shaw's appointment as Court Adviser and the compensation paid to him. In the Circuit Court of Appeals the petitioners' effort was to secure an order directing the lower court to execute the decrees of sale, a matter which the petitioners had at no time brought up before the District Court.

Entirely apart from the question whether or not the District Court could or should at this stage of the proceeding disaffirm the sales, clearly, the coercive jurisdiction of this court should not be exercised to require a District Court to take some action which the petitioners have never seen fit to ask that court to take. In other words, the petitioners are now asking this court to consider whether or not the District Court should be mandamused to take action in advance of any similar request being made in the District Court itself. The filing of the petition for mandamus in the Circuit Court of Appeals was the first time petitioners had ever raised any question concerning the sales or their confirmation. It is the first time that they have ever taken any position with reference to the pending reorganization plan or any of the proceedings concerning it.

SUMMARY OF THE ARGUMENT.

The Court of Appeals correctly refused to grant petitioners' writ of mandamus which sought to require the District Court to take action which the petitioners had not first asked that court to take.

The denial by the District Court of petitioners' oral motion for leave to file their petition was proper for several reasons:

First. The petitioners failed to comply with Rule 24 of the Federal Rules of Civil Procedure relating to intervention in that they did not file a written motion stating their grounds for intervention.

Second. Even if petitioners' application in the District Court be treated as a petition for leave to intervene, it could not form the basis of a valid order for intervention since the petitioners were already adequately represented in the proceedings by the mortgage trustees and the bondholders' committees.

Third. The petitioners failed to show when they acquired their bonds or certificates of deposit therefor and the consideration paid for them. And the failure to make that showing is an indication of the lack of good faith that is required in any attempt to intervene.

Fourth. The declared and only purpose for which intervention was sought was to impeach orders previously entered and intervention will not be permitted for such a purpose.

Fifth. The orders which the petitioners sought permission to attack were in fact valid. Courts of equity have inherent power to call to their help a court adviser.

THE ARGUMENT.

The law is clear that the Court of Appeals acted correctly in refusing to grant a writ of mandamus requiring the District Court to take action which the petitioners had not first asked that court to take.

Goldsmith v. *Board of Tax Appeals,* 270 U. S. 117.

Edinburg Coal Co. v. *Humphreys,* 134 Fed. 839 (C. C. A. 7th).

U. S. v. *Cox,* 47 Fed. (2d) 988, 990 (C. C. A. 5th).

When action is desired from a Judge of the District Court, the proper procedure is to make an appropriate motion in that court. There all parties to the cause can be heard; evidence introduced and considered; and the Judge who is familiar with the whole record has an opportunity to pass upon the question in an orderly manner. Such method of procedure is in accordance with due process of law. There are no facts alleged in the petition and none exist justifying a departure from the recognized forms of judicial procedure.

Particularly is this true in the case at bar, where the question of executing the decrees of sale and confirming the sales is one which must be decided in the light of the facts as they exist when the action is taken. The status of the franchise negotiations with the City of Chicago changes from day to day and obviously no court can act with intelligence in this matter without having all of the facts before it. The parties are entitled to have a full hearing on all of the extremely complicated questions involved before final action is taken. The petitioners have never taken appropriate action to bring about a hearing on such questions in the District Court.

The petitioners placed great emphasis on the delay in terminating the receivership proceedings. The problem in these foreclosure cases has been not only to reorganize the Chicago Railways Company, the Chicago City Railways Company and the Calumet and South Chicago Railway Company and the other companies comprising the Chicago Surface Lines and the Chicago Rapid Transit Company owning the elevated lines, but to procure from the City Council of the City of Chicago a franchise ordinance which would authorize the purchaser at the foreclosure sales to operate the properties.

The suggestions filed in the Circuit Court of Appeals (Supreme Court Record, 59-80) showing the history of the traction litigation and the opinion of the Circuit Court of Appeals, clearly set forth the facts and reasons for the delay and inability of the District Court Judge to terminate those proceedings in view of the protracted negoiations for an ordinance.

Petitioners also place great emphasis on an enumeration of the allowances which have been made for various fees in this litigation. Since petitioners made no point in their application for mandamus on any fees, other than the objection to the allowance of the fees to the Court Adviser, the matter is not in issue in this proceeding and for that reason the record is silent as to the propriety of these allowances. We merely wish to add the fact that the sum total of the fees allowed, even admitting counsel's computation to be correct is but three-tenths of one per cent of the money collected and disbursed under the supervision of the District Court in these cases. (See Supreme Court Record, 61 and also pages 60 to 80, setting forth the history and background of the Traction litigation, which must be considered at the appropriate time in passing upon the propriety of fees and allowances.)

Entirely apart from the fact that petitioners failed to

ask the District Court for the relief now sought, the denial of the petitioners' motion was proper for several reasons:

First. The petitioners failed to comply with Rule 24 of the Federal Rules of Civil Procedure relating to intervention, in that they did not file a written motion stating their grounds for intervention.

Second. Even if petitioners' application in the District Court be treated as a petition for leave to intervene, it could not form the basis for a valid order permitting intervention. The District Court, far from abusing its discretion in the matter in refusing leave to intervene, acted in compliance with well-accepted law. The petitioners as holders of certificates of deposit of certain mortgage bonds were already represented in the proceeding by mortgage trustees and their counsel, and by bondholders' committees and their counsel.

The general rule in corporate mortgage foreclosure cases is that if the mortgage trustee is a party to the suit representing all the bondholders, the individual bondholders will not be permitted to intervene unless a showing is made that such representatives are not acting in the proceeding in good faith.

Shaw v. *Railroad Co.*, 100 U. S. 605, at 611.
Richter v. *Jerome*, 123 U. S. 233, at 246.
Palmer v. *Bankers Trust Co.*, 12 Fed. (2d) 747 (C. C. A. 8th).
Guaranty Trust Company of New York v. *Minneapolis St. L. R. Co.*, 52 Fed. (2d) 418 (C. C. A. 8th).

The District Court in passing upon the petitioners' application expressly found that the petitioners "were already represented herein by a committee and competent counsel." The Circuit Court of Appeals likewise held that

the petitioners were properly represented in the proceeding (Supreme Court Record, 86).

Third. The petitioners failed to show when they acquired their bonds or certificates of deposit therefor and the consideration paid for them. And the failure to make that showing is an indication of the lack of good faith that is required in any attempt to intervene.

Fourth. The declared and only purpose for which intervention was sought was to impeach orders previously entered.

The orders sought to be impeached were those previously entered appointing Walter A. Shaw as Court Adviser, authorizing him to employ legal and engineering assistance and allowing payment for his services and expenses. Intervention will not be permitted for any such purpose.

U. S. v. *California Cooperative Canneries,* 279 U. S. 553.

Rheinberger v. *Security Life Ins. Co.,* 72 F. (2d) 147 (C. C. A. 7th).

Fifth. The orders, which the petitioners sought permission to attack, were in fact valid.

It has long been the rule that courts of equity in administering estates may call to their help commissioners, auditors, accountants, appraisers, advisers and investigators.

Ex Parte Peterson, 253 U. S. 300.

In Re Utilities Power and Light Corporation, 90 Fed. (2d) 798 (C. C. A. 7th).

THE REASONS RELIED ON BY THE PETITIONERS FOR THE ALLOWANCE OF THE WRIT.

Petitioners do not claim that the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court.

The three theories they advance to justify the exercise of this court's issuance of the writ are as follows:

A. The Contention That the Ruling of the Circuit Court of Appeals Is Inconsistent With Four Decisions Is Incorrect.

It is contended that the decision is inconsistent with the following cases.

(1) The case of *Toler* v. *E. Tennessee Ry. Co.*, 67 Fed. 168 (C. C., Tenn.), is a decision of a *nisi prius* court, which does not deal with any question of fees paid the Court Adviser or with bondholders right of intervention following a foreclosure decree. It dealt with the right of a majority of the outstanding bonds to intervene for the purpose of objecting to foreclosure by the trustee.

(2) *Gregory* v. *Pike*, 67 Fed. 837 (C. C. A. 1st), deals with rights of new parties, who came into the case by virtue of the decree, to intervention. It has no bearing on the instant case.

(3) The case of *Howard* v. *Shinn*, 190 Fed. 940 (C. C. A. 9th), permitted intervention in a case in which the same trustee having been named for different sets of bondholders consented to a decree which gave the junior bondholdholders priority of lien over the senior bondholders.

(4) The case of *Williams* v. *Morgan,* 111 U. S. 684, deals with the rights of purchasers at a railroad foreclosure sale to intervene and to object to the allowances requested by the trustees and receivers.

It is obvious that no one of these cases is in anywise analogous to the case at bar. On the other hand the decision of the Circuit Court of Appeals is in exact accord with the decisions of the Circuit Court of Appeals for the 8th Circuit, in *Palmer* v. *Bankers Trust Co.,* 12 F. (2d) 747, and in *Guaranty Trust Co. of New York* v. *Minneapolis St. L. R. Co.,* 52 Fed. (2d) 418.

B. The Contention That the Decision of the Circuit Court of Appeals Erroneously Construed and Misapplied the Law in Two Decisions of This Court as Controlling Is Incorrect.

Petitioners contend that the Circuit Court of Appeals misconstrued and misapplied the decisions of this court in *Shaw* v. *Railroad Co.,* 100 U. S. 605, and *Richter* v. *Jerome,* 123 U. S. 233. A reference to the decision of the Circuit Court of Appeals will show that the cases cited were simply to sustain the proposition that the petitioners in this case were represented by the mortgage trustees, and that being represented they were not entitled to intervene in the absence of proof that they were not adequately represented by such trustees.

It is asserted by counsel for the petitioners that with reference to intervention a different rule should apply after the decree than that which is applicable before the decree. No reason for this is cited and no authority sustains this contention.

Petitioners contend that they are parties by the express terms of the decrees entered in the proceedings in

the case at bar. Reliance is placed upon a quotation made from the decree of foreclosure to the effect that the term "party" as used in the decree "is intended and shall be deemed to mean and include all holders of bonds." This quotation like other isolated quotations is completely distorted by the fact that the entire context of the quotations is not set forth. And upon turning to the article of the decree from which it is quoted, we find that that article provided for an injunction to protect the purchaser of the property against the subsequent action of any party. Of course, such an injunction would be useless if it did not run against the parties by representation as well as against the named parties. The bondholders fall in the first class. To leave the language "any party" without definition might lead to some contention in the future that the injunction was not intended to cover represented parties but only named parties, and hence, the definition. The Bondholders' position was not thereby changed from a party by representation to a named party.

C. The Contention That the Circuit Court of Appeals Should Review the Plan in Advance of Its Confirmation by the District Court Is Contrary to the Accepted and Usual Course of Judicial Proceedings.

In an attempt to bring themselves within the language of the rules of this court, concerning reasons for granting writs of certiorari, the petitioners argue that the District Court's denial of petitioner's right to intervene is a departure from accepted and usual course of judicial proceedings calling for an exercise of this court's supervisory power.

The contention is that it is illegal for the lower court to pass upon a plan of reorganization and that such ille-

gality can be reviewed in a mandamus proceeding. In support of their contention, they cite two decisions of the Supreme Court which clearly do not support this position.

The first case is *The First National Bank* v. *Flershem,* 290 U. S. 504, and the second case is *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106. The facts in these cases are entirely different from those of the case at bar and they have no relevancy to the question here presented.

Petitioners have not established any reason which brings them within the rules of this court justifying the issuance of a writ of certiorari.

The conclusion of the Circuit Court of Appeals in this case that the "unusual delay is the result of the stupendous problem with which the court and interested parties have been confronted" (Supreme Court Record, 86) is conclusively demonstrated by the record. (See Supreme Court Record, 59-80.) The complexities are many, including an unprecedented financial depression, the difficulty of securing a proper franchise from a municipality, and a major transformation in metropolitan transportation. The final solution has on several occasions almost been attained. It has been lost by fortuitous circumstances beyond the control of the security holders or the court.

No good purpose can be served at this time by a review of the decision of the Circuit Court of Appeals. No plan of reorganization has been finally approved; amendments to the pending plan will have to be submitted to the security holders and an opportunity for filing objections will be afforded at the appropriate time. When the plan comes before the court for final decision the petitioners will have their day in court and the right to a further hearing on any question affecting them.

We therefore respectfully ask that petitioners' application for a writ of certiorari be denied.

Respectfully submitted,

JAMES M. SHEEAN,
Attorney for Respondent.

Of Counsel:

J. F. DAMMANN,
Counsel for Trustee of First Mortgages of Chicago City Railway Company and Calumet and South Chicago Railway Company;

HENRY F. TENNEY,
Counsel for the Trustee of First Mortgage and the Bondholders' Committee of Chicago Railways Company;

WILLIAM J. FRIEDMAN,
Counsel for First Mortgage Bondholders' Committees of Chicago City Railway Company and Calumet and South Chicago Railway Company;

JOHN W. KEARNS,
Counsel for Committee Representing Holders of Chicago City and Connecting Railways Collateral Trust Bonds;

WM. J. FROELICH,
Counsel for Walter A. Shaw.